

**THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 002/2010

BETWEEN: CHIEF REGISTRAR

Applicant

**V.D.: VIPUL MISHRA
MEHBOOB RAZA
MUHAMMAD SHAMSUD-DEAN SAHU KHAN
SAHU KHAN & SAHU KHAN**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent**

**Applicant : Ms V. Lidise & Mr A. Chand
Respondent : Mr S K Ram
Respondent : Ms N Khan
Respondent : Mr G P Lala**

**Date of Hearing : 28th April 2011
Date of Judgment : 4th May 2011**

JUDGMENT ON SENTENCE – 1ST RESPONDENT

The 1st Respondent has been found guilty of two counts of professional misconduct being breaches of section 82(1)(a) of the Legal Practitioners Decree 2009 which are particularised as following:-

VIPUL MISHRA a legal practitioner, between the period from the 11th day of April 2006 and the 22nd day of October 2006, being the solicitor appointed by one Ambika Nand, the vendor, in the Sale and Purchase Agreement with one Sashi Kiran Pratap, the purchaser, for the sale and purchase of Crown land situated at Nukudrala, Ba, registered under Crown Lease No. 16375, being Lots 10 and 13 on BA2298 and BA2301 leased to Ambika Nand, which land was previously leased to the said Ambika Nand under Crown Lease 5375, having received correspondence from Cromptons on behalf of the Reserve Bank of Fiji concerning Mortgage No. 201344 registered against Crown Lease 5375 held by the said Ambika Nand, failed to properly inquire or cause proper inquiry into the matter of Mortgage No. 201344 and Crown Lease 5375, which mortgage was subsequently brought forward against Crown Lease 16375 and subsequently transferred to the said Sashi Kiran Pratap, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence.

VIPUL MISHRA a legal practitioner, on or about the 23rd day of October 2006, being the solicitor appointed by one Ambika Nand, the vendor, in the Sale and Purchase Agreement with one Sashi Kiran Pratap, the purchaser, for the sale and purchase of Crown land situated at Nukudrala, Ba, registered under Crown Lease No. 16375, being Lots 10 and 13 on BA2298 and BA2301 leased to Ambika Nand, failed to disclose to either Sashi Kiran Pratap or her appointed solicitor, all the material facts concerning the said lease, which the said Vipul Mishra knew or ought to reasonably have known, in particular, that an undischarged mortgage and a caveat had been registered against Crown Lease No. 5375, the initial lease issued to Ambika Nand over the same said land at Nukudrala Ba, which Vipul Mishra knew or ought to reasonably have known, which conduct involved a substantial failure to reach or a reasonable standard of competence and diligence.

2. In essence both counts relate to the failure to disclose to the purchaser or her solicitor the existence of a mortgage to the Reserve Bank. The mortgage was registered on Crown Lease 5375 but was not brought forward on Crown Lease 16375 upon the registration of that new or renewed lease.
3. Section 82(1)(a) relevantly provides that professional misconduct includes unsatisfactory professional conduct of a legal practitioner if the conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.
4. Section 121 of the Legal Practitioners Decree sets forth the powers of the Commission upon a finding of professional misconduct or unsatisfactory professional conduct. The ultimate sanction is that the legal practitioner's name be struck from the roll and the most lenient penalty is a reprimand.
5. When considering the appropriate penalty it is necessary to consider not only the nature of the misconduct but also those of the following issues as are relevant:-
 - (i) The frequency of the misconduct and prior finding of misconduct;
 - (ii) The lawyers age and professional experience;
 - (iii) The lawyers attitude;
 - (iv) The lawyers (lack of) appreciation of wrong doing;
 - (v) Testimonials and opinions by third parties;
 - (vi) Illness and stressors suffered by the lawyer;
 - (vii) The loss suffered by third parties as a result of the lawyers misconduct;
 - (viii) The loss already suffered by the lawyer personally as the result of the misconduct.
6. If satisfied that the conduct is an isolated blight on an untarnished professional career then a less severe penalty may be appropriate - Legal Practitioners Conduct Board v Nicholson (2006) 243 LSJS 293.
7. The level of experience may be relevant and it may, if the misconduct is a one-off in and otherwise unblemished lengthy professional career, support the conclusion that it was

entirely out of character and does not warrant a severe disciplinary sanction, dependant of course on the seriousness of the misconduct - Chamberlain v Australian Capital Territory Law Society (1993) 118 ALR 54.

3. It was said in New South Wales Bar Association v Evatt (1968) 117 CLR 177 at 184

"The Respondent's failure to understand the error of his ways of itself demonstrates his unfitness to belong to a profession where, in practice, the client must depend on the standards as well as the skill of his professional adviser."

7. The main purpose served by disciplinary proceedings is to protect members of the public from misconduct by lawyers - Southern Law Society v Westbrook (1910) 10 CLR 609 at 622. This recognizes the public interest in the integrity of the members of the profession, so central to public confidence in the legal system. In New South Wales an appellate judge branded the protective function as a "recognition of the social value in the availability of the services provided to the public, combined with an understanding of the vulnerability of many who require such services" - New South Wales Bar Association v Meakes [2006] NSWCA 340.

10. Related to this are the objectives of maintaining proper standards in the profession and setting an example to other lawyers - De Pardo v Legal Practitioners Complaints Committee (2000) 170 ALR 709. It cannot be denied, to this end, that a disciplinary sanction may deter other lawyers from engaging in the impugned conduct and also deter the lawyer disciplined and so indirectly protect the public against like defaults. It is said that this means that a court or tribunal, in making a disciplinary order, takes account of the message that the order conveys to other lawyers, particularly young lawyers - Re Drew (1920) 20 SR (NSW) 463 at 466.

The fact that professional disciplinary proceedings are directed at a chiefly protective objective does not deny that they may generate an outcome that is punitive in effect. The courts have not denied the deterrent effect of disciplinary orders, but have emphasized the link between deterrence and the central protective aim - Law Society of New South Wales v Foreman (No 2) (1994) 34 NSWLR 408 at 441. Protection of the public may thus justify a "punitive response". Such a response shows the grave view the court or tribunal takes of the misconduct; a failure to mark its censure and disapproval via a punitive response in the case of grave misconduct may be viewed by the public as almost tacit approval - Legal Practitioners Conduct Board v Boylen (2003) 229 LSJS 32. The imposition of a fine, although apparently punitive in effect, may have a protective effect in discouraging other lawyers from misconduct - Re a Medical Practitioner [1995] 2 Qd R 154, or at least a deterrent effect on the lawyer who has been fined. It may even operate, in some circumstances, to deprive the lawyer of monetary gain that was secured by the unprofessional conduct - Legal Services Commission v Mullins [2006] LPT 012.

12. A consequence of the conduct of the Respondent is that the purchaser Sashi Kiran Pratap purchased a parcel of land which, unbeknown to her, had the burden of a mortgage to the Reserve Bank. The mortgage is still on the title and the current balance owing is \$81, 830.49 [Ex A2].
13. The Applicant submits that an order pursuant to section 121(1)(j) of the Legal Practitioners Decree should be made to facilitate discharge of the mortgage to the Reserve Bank.
14. It is further submitted that the 1st Respondent did not fully meet the consideration for which legal fees in the sum of \$1,184.88 were paid and that such monies should be refunded to the Complainant (purchaser).
15. Witness expenses in the sum of \$241.83 are claimed and are not opposed.
16. The Applicant further submits that as the 1st Respondents' conduct related directly to his ethical responsibilities, his status as a senior practitioner, the direct consequential effect on the Complainant in that she is now liable for the mortgage debt and the fact that his misconduct is the basis upon which the entire complaint was generated, it is submitted that a penalty at the higher end of the penalty provisions be imposed.
17. It is submitted on behalf of the 1st Respondent that the situation is of an isolated nature and would not have occurred had certain events over which the 1st Respondent had no control not taken place. It is submitted that these were :-
 - (a) A period of two years and 4 months elapsed from the expiry of the old lease (1st January 2004) to the date of issue of the new lease (5th April 2006) and the mortgagee took no steps whatsoever to endorse their mortgage in accordance with section 60(1) of Land Transfer Act.
 - (b) The mortgagee had possession of the old lease and as such had express notice of when it expired. When they wrote to the 1st Respondent on the 11th of April 2006 they did not indicate that they wanted their mortgage to be endorsed on a new lease.
 - (c) On 19th October 2006, the mortgagee wrote to the Director of Lands instead of the Registrar of Titles asking the failure to endorse their client's mortgage on the new lease to be rectified. There is no evidence that this letter was sent or copied to the 1st Respondent.

(d) Cromptons wrote to the 1st Respondent and wanted to know how his client, the vendor, would clear the mortgage debt. The 1st Respondent, on instructions of his client, denied the debt sum. No request was made to endorse the mortgage on the new lease.

(e) The Director of Lands prepared the new lease and the Registrar of Titles registered it.

(f) The Registrar of Titles noted two memorials, which were noted as being brought forward from an old crown lease being no 5375. The Registrar did not make any note as to the date on which these were brought forward.

(g) Despite consent to the transfer being given almost a month before settlement took place, the purchaser lodged no caveat. The 1st Respondent could not provide legal advice on this issue to the complainant because he did not act for her.

It is not disputed by the Applicant that the 1st Respondent has a good record and is a contributor to the legal profession and the community. The 1st Respondent specifically highlights :-

(a) He is 53 years old and has a clear record since his admission to practice in Fiji on the 25th of September 1981. This year will be his 30th year in legal practice and he spent majority of his life in the legal profession.

(b) 1st Respondent graduated from the University of Tasmania in 1980 and completed his practical training at the Australian National University.

(c) Prior to the creation of the Legal Aid Commission the 1st Respondent over a period of 5 years carried out public legal adviser work for maintenance and divorce matters at the Ba Magistrates Court.

(d) 1st Respondent served as a council member of the Fiji Law Society for 9 years and was the vice president for 3 of those years. During this period he acted as president on occasions and did much of the work on the research and drafting of the written submissions on behalf of the Fiji Law Society to the Manuelli Commission.

(e) 1st Respondent researched and drafted much of the written submission on behalf of the Fiji Law Society to the Reeves Commission which facilitated the 1997 Constitution.

(f) He acted as counsel for the Fiji Law Society in the Commission of enquiry into the courts and judicial system in Fiji conducted by Sir David Beattie.

(g) The 1st Respondent was for a period of two and a half years a Director of the Fiji Sugar Corporation Limited.

19. Against this the Applicant submits that in all the circumstances and taking account that the dominant purpose of disciplinary proceedings is to protect the public and to convey a clear message of deterrence that an order should be made under section 121(1)(b) of the Legal Practitioners Decree suspending the 1st Respondent's practicing certificate for a period of between 6 – 12 months.

20. Whilst it is acknowledged that the 1st Respondent was a victim of circumstance it is not denied that he having received correspondence from the solicitors for the mortgagee failed to disclose this to the solicitors for the purchaser.

21. "The dividing line between the legitimate and illegitimate exploitation of an opposing lawyer's mistake depends, according to Chamberlain, on whether the mistake in question has been fostered by the lawyer. This very point is expressed in r 20.2 of the Western Australian Professional Rules and commentary [4] of ch XVI of the Canadian Bar Association's Code of Professional Conduct, respectively, as follows:

"A practitioner who observes that another practitioner is making or is likely to make a mistake or oversight which may involve the other practitioner's client in unnecessary expense or delay must not do or say anything to induce or foster that mistake or oversight, but must draw the attention of the other practitioner to that mistake or oversight, unless doing so might prejudice the practitioner's own client.

The lawyer should avoid sharp practice and not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving any sacrifice of the client's rights." – Riley Solicitors Manual paragraph 28.020.20.

22. In *Chamberlain -v- The Law Society of the Australian Capital Territory* 118 ALR 54 at 61 Black CJ said:

"[Such conduct] would be detrimental to a relationship characterised by courtesy and fairness that ought to exist between members of the legal profession. A relationship of that nature ... has as its justification not merely social and ethical mores; it has an additional justification referable to the public interest, in that courtesy and fairness contribute materially to the effective and expeditious performance of legal work ... Another vice of conduct that induces or fosters a mistake is that it may easily involve, or in practical terms be close to, misrepresentation. In this way such conduct is, of its nature, liable to be in tension with the overriding duty of honesty that practitioners owe to the courts, their clients and to their fellow practitioners."

3. The 1st Respondent in breach of his ethical obligations breached his duty of honesty to a fellow practitioner.
4. Balancing the conduct against the prior excellent standing of the 1st Respondent and the need to protect the community and deter others I do not think that a period of suspension is warranted.
5. It is of concern that the Complainant is facing a payment to the Reserve Bank of \$81,830.49 having paid legal fees of \$1,184.88 to the 1st Respondent as the vendor's legal fees pursuant to the terms of the sale & purchase agreement.
6. The Complainant may have other remedies available to recover the monies and remove the mortgage but she would not be faced with these further legal costs but for the part played by the 1st Respondent in this sorry saga. I therefore see no choice but for the 1st Respondent to pay the sum of \$81,830.49 or alternatively to indemnify the Complainant for such amount as she is required to pay to facilitate the removal of the mortgage to the Reserve Bank of Fiji.
7. Payment of the mortgage debt or the removal of the mortgage is indeed a significant penalty and one that I trust will act as a deterrent to members of the profession and thus afford protection to the community in the future.
8. In the light of the orders that I propose I do not think it is appropriate that a significant monetary penalty be imposed on the 1st Respondent and I propose therefore that he be fined a lesser amount than would otherwise be appropriate.

ORDERS

1. The 1st Respondent shall do all things necessary to facilitate the removal of mortgage no. 210344 from CL16375 whether by legal action, payment of the mortgage debt or otherwise.
2. If prior to the removal of the mortgage the mortgagee seeks to exercise such rights as it might have pursuant to the mortgage the 1st Respondent shall keep Sashi Kiran Pratap indemnified against any payment for principal, interest or legal expenses.
3. Should the mortgage not be removed from CL16375 on or before the 31st December 2011 the 1st Respondent's practising certificate shall be suspended without further order.
4. The 1st Respondent is fined the sum of \$10,000 to be paid to the Independent Legal Services Commission within 28 days.
5. Witness expenses in the sum of \$241.83 shall be paid to the Independent Legal Services Commission within 28 days.
6. Should the payments in orders 4 and 5 not be made within 28 days the 1st Respondent's practising certificate shall be suspended without further order.
7. Liberty to apply is granted.


JOHN CONNORS
COMMISSIONER

